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ABSTRACT

The Newspaper Preservation Act, passed by the United States Congress in 1970, granted special antitrust exemptions to certain newspapers as a means of maintaining the editorial and reportorial independence and competitive nature of the press. However, an analysis of specific cases that have involved the act reveals that, while purportedly designed to maintain two independent editorial voices in a community, the act has been used to eliminate economic competition that might otherwise have been preserved. In addition, the act has not prevented the demise of dual editorial voices in metropolitan areas. Finally, the intent of the act has been distorted by including under its aegis newspapers that are not in probable danger of financial failure. As current antitrust legislation receives close scrutiny by the Congress, a reassessment of public policy regarding the Newspaper Preservation Act would seem to be appropriate as well. (Author/FL)

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THE NEWSPAPER PRESERVATION ACT: A RETROSPECTIVE ANALYSIS

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THE NEWSPAPER PRESERVATION ACT: A RETROSPECTIVE ANALYSIS

If the 91st Congress had been able to see a decade into the future when it passed the Newspaper Preservation Act in 1970 granting special antitrust exemptions for certain newspapers, would it still have considered the Act a valid means of "maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States"? As current antitrust legislation receives close inspection by the Congress this year, a reassessment of public policy regarding the Newspaper Preservation Act would be appropriate as well.

This commentary will attempt to show through specific cases involving the statute that:

I. The Act, while purportedly designed to maintain two independent editorial voices in a community, has been used to eliminate economic competition which otherwise might have been preserved.

II. The Act has not prevented the demise of dual editorial voices in metropolitan areas.

III. The intent of the Act has been distorted by including under its aegis newspapers that are not in probable danger of financial failure.

Each of these assertions will be examined in the light of cases which have arisen under the Act in the past nine years. But in order to evaluate the impact of these cases, some background on the formation of the Act is necessary.

The Newspaper Preservation Act of 1970[1] sanctions conduct (specifically, price fixing, profit pooling and market allocation) for a select group of jointly operating newspapers which otherwise is expressly prohibited under U.S. antitrust laws (the Sherman and Clayton Acts). The exemptions granted by Congress under the Act to those joint ventures already in existence and to any that might be approved in the future hold in perpetuity the right of these newspapers to engage in monopolistic practices of setting joint advertising rates, circulation rates and revenue distribution. (Refer to Appendix A for the wording of the Act.)

Joint newspaper operating arrangements grew out of the Depression years. In the 1930s many metropolitan daily newspapers were in financial trouble, yet through a joint operating arrangement they found they could reduce costs by combining the economic and business aspects of their papers' production, while at the same time maintaining separate editorial and reportorial staffs.[2]

The first of these joint operating ventures was established in Albuquerque, N.M., in 1933 between the Journal Publishing Co. and the New Mexico State Tribune. By 1966, 44 newspapers in 22 cities had entered into similar operating arrangements.[3] Two of these cities (Franklin-Oil City, Pa., and Bristol, Tenn.) have since lost one of the competing newspapers, and one city (Anchorage, Ala.) which entered into a joint operating venture after the passage of the Act dissolved the agreement March 31, 1979. (A list of the joint operating ventures is given in Appendix B.)

Were these joint operating arrangements legal?

The first antitrust legislation, the Sherman Act, was passed in 1890.[4] It provided in part that:

> Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States . . . is declared to be illegal. (Sec. 1)
>
> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a misdemeanor . . . . (Sec. 2)

In 1914 the Clayton Act[5] was passed to tighten up some of the loopholes in the Sherman Act. Of particular interest to this discussion is Section 7, which provides in part as follows:[6]

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

It was not until 1930 that the Supreme Court in the landmark case of International Shoe Co. v. FTC[7] declared that not only were bankrupt firms exempt from provisions of the Clayton Act, but that corporations heading in that direction were exempt as well:[8]

> . . . [For] a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure with resulting loss to its stockholders and injury to the communities where its plants were operated, we hold that the purchase of its capital stock by a competitor (there being no other prospective purchaser), not with a purpose to lessen competition, but to facilitate the accumulated business of the purchaser and with the effect of mitigating seriously injurious consequences otherwise probable . . . does not substantially lessen competition or restrain commerce within the intent of the Clayton Act. To require such a transaction as a violation of law . . . seems a distempered view of purchase and result.

This "failing company" doctrine was first recognized by the legislature 20 years later in Senate Report No. 1775, which accompanied the Cellar-Kefauver Bill amending 15 U.S.C. 18 (Section 7 of the

Clayton Act).[9]

The rationale for the failing company defense is that the acquisition of a failing company does not substantially lessen competition, presumably because the failing company would have gone out of business anyway and therefore would not have remained a competitive factor.[10]

In order to qualify under this defense, two criteria must be met: (1) either the acquired or the acquiring company must be a "failing" company, and (2) there must have been no other prospective purchaser. With reference to the first criterion, a corporation is not failing unless it faces the grave probability of business failure; and with reference to the second criterion, an effort must be made to sell the company to other purchasers, and reasonable offers must not be refused.[11]

Additional criteria set down in International Shoe include (3) dim or nonexistent prospects of reorganization, (4) probable harm so serious that the public interest requires that the acquisition be permitted, and (5) intent to facilitate the accumulated business of the purchaser and not to lessen competition.[12]

From 1930 through 1970 the failing company defense was sustained by the Courts in only four cases.[13] Yet the doctrine's impact lies not in litigated cases, but in its use by the Justice Department and the FTC in determining whether to challenge a particular acquisition.[14]

The Justice Department sets forth a two-element test (the same as the first two criteria applied in International Shoe): failing company plus no other prospective purchaser, omitting reference to dim reorganization prospects, public interest, or valid purpose.

But where the FTC is involved, the defense may have to satisfy all five criteria. Nevertheless, the company that seeks pre-merger clearance through the FTC and Justice Department has an easier time of proving failing company defense than it does through litigation in the courts.[15]

For more than 30 years the Antitrust Division of the Justice Department "overlooked" the joint operating arrangements that were being made by newspapers. But in 1964 the Department decided to make a test case out of a merger of two newspapers in Tucson, Ariz. (U.S. v. Citizen Publishing Co.[16])

In 1940 Tucson, Ariz., had two daily newspapers, the evening Star and the morning Citizen. Although their circulation was about even, the Citizen was losing money and the Star was operating at a profit.[17] The owner of the Star proposed the formation of a joint operating venture to be known as Tucson Newspapers, Inc. (TNI), which would be owned in equal shares by the Star and Citizen. The purpose of the agreement was to end any business competition between the two papers while keeping separate editorial and reportorial staffs, and to that end three types of controls were imposed: (1) Price fixing: commercial advertising was sold only by the TNI advertising department. Subscription and advertising rates were set jointly. (2) Profit pooling: all profits were pooled and distributed to the Star and Citizen by TNI according to an agreed ratio. (3) Market control: It was agreed that neither the Star nor the Citizen would engage in any other business in Pima County in conflict with the joint venture.

This agreement realized the two papers a jump in before-tax

profits from less than $28,000 in 1940 to more than $1,725,000 in 1964.[18]

In 1964 an out of state publisher offered the Star's owner $10 million for his paper, provided that the joint operating agreement with the Citizen remained in effect. At that, the owner of the Citizen turned around and offered to buy the Star for $10 million as well, creating the Arden Publishing Co. to serve as the vehicle by which Citizen shareholders could buy up the Star's stock.

It was this new deal between the two papers which brought the case to the attention of the Antitrust Division of the Justice Department.

The Department filed a complaint in the U.S. District Court of Arizona charging unreasonable restraint of trade in violation of Sec. 1 of the Sherman Act, and a monopoly in violation of Sec. 2. (These charges stemmed from the initial 1940 agreement.) The District Court on April 16, 1965, found that the joint operating agreement was unlawful per se under Sec. 1, and granted the government's motion for summary judgment. The case went to trial on the Sec. 2 charge and also on a charge under Sec. 7 of the Clayton Act arising out of the Citizen's acquisition of the Star stock under the guise of Arden Publishing Co.

The District Court found that the joint operating agreement monopolized the only newspaper business in Tucson in violation of Sec. 2 of the Sherman Act, and that in Pima County (the appropriate geographic market) the Citizen acquisition of the Star stock would lessen competition in violation of Sec. 7 of the Clayton Act.[19]

Chief District Court Judge Walsh ordered submission by the defendants of a plan for divestiture and re-establishment of the Star as an independent competitor and for modification of the joint operating

arrangement so as to eliminate the price fixing, profit pooling and market control provisions.[20]

Defendants appealed directly to the U.S. Supreme Court, which affirmed the District Court's ruling. In the 7-1 vote, Mr. Justice Douglas expressed the view of the Court that (1) the defendants were guilty of the violation as charged, (2) there was insufficient evidence to sustain defendants' "failing company" argument, and (3) the restraints imposed by the District Court on the joint operating agreement did not violate defendants' First Amendment rights.[21]

The Court cited International Shoe[22] in its conclusion that Citizen Publishing Co. did not meet any of the requirements for a failing company, and cited Associated Press v. U.S.[23] in its ruling that joint operating arrangements were not protected by the First Amendment. Mr. Justice Douglas wrote:[24]

> Neither news gathering nor news dissemination is being regulated by the present decree. It deals only with restraints on certain business or commercial practices. The restraints on competition with which the present decree deals comport neither with the anti-trust laws nor with the First Amendment.
>
> It would be strange indeed . . . if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reason to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the people, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford nongovernmental combinations refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.

Even before the Supreme Court handed down its decision in Citizen Publishing, plans were underway in Congress to secure immunity from antitrust laws for the newspaper industry. In 1967 Sen. Carl Hayden of Arizona introduced the first anti antitrust bill known as the "Failing Newspaper Act." He was joined by 14 other senators, all from states where joint operating agreements existed similar to the Citizen-Star arrangement.[25]

A similar bill was introduced in the House by Rep. Spark M. Matsunaga of Hawaii (another state housing a joint operating newspaper venture), and was considered by the 90th Congress along with 14 other bills on the subject.[26]

The bill was not reported out of the House Antitrust Subcommittee that session, and on January 3, 1969 (12 days before the Supreme Court heard arguments in Citizen Publishing and nine weeks before its decision was rendered), Rep. Matsunaga introduced H.R. 279, the Newspaper Preservation Act.[27]

In the Senate, Sen. Daniel Inouye (also of Hawaii) introduced S. 1520 (a bill very similar to H.R. 279) two days after the Supreme Court decision in Citizen Publishing was handed down. Sen. Inouye's bill passed the Senate on Jan. 30, 1970, by a vote of 64 to 13. The House version of the bill was approved 292-87 on July 8, 1970.[28] The Senate bill was passed in lieu of the House bill after substituting for its language much of the language in the House bill, and it was signed into law July 24, 1970.[29]

The legislative and judicial action which has been taken since the passage of the Act will be examined below in the light of the three

assertions made in the introduction:

I. The Act, while purportedly designed to maintain two independent editorial voices in a community, has been used to eliminate economic competition which otherwise might have been preserved.

II. The Act has not prevented the demise of dual editorial voices in metropolitan areas.

III. The intent of the Act has been distorted by including under its aegis newspapers that are not in probable danger of financial failure.

I. THE ACT HAS BEEN USED TO ELIMINATE ECONOMIC COMPETITION WHICH OTHERWISE MIGHT HAVE BEEN PRESERVED

Inherent in the Act is the idea that newspapers are different from other industries and therefore deserve special consideration with regard to antitrust laws. The assumption that newspapers occupy a unique place in a democratic society because of their ability to dispense news, information and opinion is apparent in the stated purpose of the Act (refer to Appendix A) and reflects the famous passage by Justice Learned Hand:[30]

> [The press] serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible . . . . [It] presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritarian selection.

Does the search for "right conclusions" through a "multitude of tongues" suggest that there is an overriding need for freedom from economic competition to maintain a monopoly position with regard to advertising, circulation and market allocation?

This question was examined in a case involving the joint operating venture between the San Francisco Chronicle and Examiner. In that case

Chief Judge Oliver J. Carter of the federal district court of California held that the Act did not violate the First or Fifth Amendments, did not preempt but did modify state antitrust laws, and applied to conduct occurring both before and after its passage.[31]

Bruce B. Brugmann, publisher of the San Francisco Bay Guardian, a fortnightly newspaper, and Stephen R. Barnett, a University of California law professor, who filed the suit to test the Act's constitutionality, charged that the joint operating agreement of the San Francisco Chronicle and Examiner maintained a monopoly position in the city which was driving the Bay Guardian out of business.

They contended also that the profit sharing and joint advertising rates by the Chronicle-Examiner established and perpetuated a stranglehold on the San Francisco newspaper market. They charged that the Act was unconstitutional because it unfairly encouraged such a journalistic monopoly.

The District Court found, however:

> (1) The Act does not authorize any conduct (and) . . . in many respects is merely a codification of the judicially created 'failing company' doctrine.
>
> (2) The Act . . . does not confer any license to monopolize and indeed has a specific provision prohibiting 'predatory practices.'
>
> (3) There is no political or other discrimination either on the face of the Act or in any implicit terms.

Yet despite its ruling, the District Court seemed to be in sympathy with opponents of the legislation:

> It may be that Congress could have adopted a less heavy-handed piece of legislation to accomplish the objective of maintaining the solvency of large metropolitan daily newspapers. However, this Court does not detect any compulsion for such rectitude in either the First or Fifth Amendment. Congress has legislated

> under the Commerce Clause and this Court will uphold the ability of Congress to so act even if its decision may have been unwise. This Court does not sit as super-legislator to re-evaluate the financial and other data upon which Congress made its decision. Finding no constitutional defect in the Act, this Court cannot negate the legislative judgment upon a matter within the Congress' power to act.

In rendering its decision, the District Court left the way open for plaintiffs to assert claims of antitrust damages against the San Francisco papers.

Five antitrust law suits were subsequently filed by 17 plaintiffs, most of whom were advertisers or previous advertisers in the Chronicle and Examiner. One of the plaintiffs, owners of an area department store, charged it closed seven of its branches and went out of business as a result of the doubling of advertising rates after the merger of the Chronicle and Examiner.

An out-of-court settlement was reached in May 1975 in which the San Francisco Chronicle, the San Francisco Examiner and their jointly operated printing company agreed to pay $1.35 million in damages to the plaintiffs.[32]

Two years later the U.S. Justice Department's task force on antitrust immunities, after evaluating the economic impact of the NPA, admitted that the agreements approved under the Act may "contribute to increased advertising costs in particular local markets" but due to the Act's "very recent legislative origin" it did not merit "detailed scrutiny at this time."[33]

Nevertheless, the Act and the changes caused by it in the economic marketplace have evoked considerable public scrutiny in the past several years.

Attention was drawn to the Act by the stormy five-year marriage and subsequent divorce of the first two newspapers to apply for coverage under the Newspaper Preservation Act. In 1974 the Anchorage (Alaska) Daily News and the Anchorage Times applied to the Attorney General for a joint operating agreement. The venture was approved with little, if any, fanfare and made Anchorage the 23rd city with a joint operating arrangement.

But the marriage of economic convenience was short-lived. In February 1977, less than three years after the agreement went into effect, the News filed suit to dissolve the agreement. And after two years of litigation and hundreds of thousands of dollars spent in court costs, the two newspapers settled out of court to terminate the arrangement, effective March 31, 1979. In the settlement, the Times agreed to pay the News $1 million in damages for mismanagement.[34]

When the two papers originally entered the agreement, the News publisher, Katherine Fanning, said she had expected her "failing" 16,000-circulation paper to make very strong improvements. Instead, the paper's losses increased annually while the Times handled the business affairs for both newspapers. In the mismanagement suit, the Times was found to have failed to keep "full and accurate books of accounts showing all transactions" for the two newspapers.[35]

Besides causing extraordinary advertising rate increases (as in the San Francisco case) and mishandling the business affairs of one of the parties to a joint agreement (as in the Anchorage case), the Act also distorts the economic marketplace by making it more advantageous for a newspaper to "fail" (and hence qualify for a joint agreement) than to remain solvent and independent.

This third type of economic warping has occurred in Cincinnati where the Scripps-Howard owned evening Post has sought approval from the Attorney General for a joint venture with the morning Enquirer, owned by American Financial Corp. Here the prospect of a profitable monopoly through a joint agreement appears to have led the owners of the Post to forego any measures which would have lessened or reversed a declining trend at the paper. In other words, the paper's owners, contemplating easy profitability through a joint venture rather than continued autonomy, appear to have elected a course of action which would enhance the "failing" nature of the paper and thus would qualify the Post for consideration under the Newspaper Preservation Act.

Oral argument on approval of the application for the joint operating venture was heard in September and October 1978 before Administrative Law Judge Donald R. Moore and included testimony by E.W. Scripps Co. executives, representatives of the eight unions at the Post and attorneys for both sides. Also taking part in the hearings were attorneys representing the Antitrust Division of the Justice Department.

At the conclusion of the hearings Gerald A. Connell, chief of the General Litigation Section of the Antitrust Division, submitted the Antitrust Division's recommendation to Judge Moore that the Post be considered a failing newspaper and that Judge Moore recommend to the Attorney General that the application be granted.[36]

In its presentation, the Antitrust Division stated that "the record supports the conclusion that the Post is in probable danger of financial failure." The unions, however, found differently. In its

"Proposed Findings of Fact and Conclusions of Law" the International Typographical Union and The Newspaper Guild concluded that:

(A) Approval of the joint operating agreement should be barred because of Scripps' stated refusal to consider any offers for the purchase of the Post.

(B) The Post is not in probable danger of financial failure.

(C) Scripps has not exhausted all reasonable means to continue publication of the Post as an independent entity. Rather, through deliberate actions or inactions Scripps has tried to achieve a failing newspaper status for the Post in order to qualify under the Act.

Opponents of the application supported their conclusions with the following Findings of Fact and Conclusions of Law:[37]

(A) The E.W. Scripps Co. has repeatedly refused to offer the Post for sale:

The Newspaper Preservation Act requires that before a newspaper is entitled to the benefits of a joint operating arrangement, it must exhaust all other reasonable methods of maintaining the paper's independent identity short of a joint operating arrangement.[38] This includes the requirement that the paper be sold to a willing buyer. In enacting the legislation, Congress did not intend to permit an applicant to ignore the possibility of a sale--much less deliberately to preclude a sale. Yet Scripps has consistently thwarted the possibility of a new purchaser continuing the Post as an independent operation by its steadfast refusal to place the Post on the market.

(B) The Post is not in probable danger of financial failure:

(1) The Cincinnati Post is not an enterprise with the characteristics of a failing newspaper. Although the Post has had a

a decline in circulation over the last several years, it currently maintains a lead over its only competitor, the Cincinnati Enquirer, and with the exception of one ABC reporting period has maintained that lead since 1958.

(2) The Post carries almost 50 percent of the daily newspaper advertising linage and revenue in the Cincinnati area.

(3) Over the last 20 years the Post has returned a net pre-tax profit to Scripps of some $7 million.

(4) Many of the losses to the Post in the past several years may be attributed to nonrecurring expenses such as

(i) the buyout of a substantial number of Post printers;

(ii) costs of publishing a free Sunday advertiser known as the Valu-Saver; and

(iii) installation of new presses and cold type equipment.

(C) The Post has not exhausted all reasonable means available to reduce the costs of operations or to increase its revenues:

In the early 1970s Scripps began to contemplate a joint operating venture with the Enquirer, and in 1973 Edward W. Estlow, president of the E.W. Scripps Co., obtained a confidential engineering study on the merits of such an arrangement. Discussions between representatives of the two newspapers on such a joint venture began prior to the summer of 1974. Throughout this time Scripps faced several major decisions with respect to operating the Post and in each instance appeared to take action that was least likely to enhance the Post's competitive position vis-a-vis the Enquirer:[39]

(1) It has failed to bargain with the eight unions at the Post to reduce costs through manning cutbacks, wage cuts, continuation of a wage moratorium, or an easing of jurisdictional lines to reduce manning requirements.

When bargaining new contracts in 1977, management made no proposals for cost-saving labor programs and since that time no one from Scripps or from the Post has made any proposals or requested to bargain with any of the unions over any cost-saving measures. Yet in the past Post's management has carried on hard bargaining with its unions. Such inaction at the Post is in direct contrast to the determined stance taken by management of the Washington Star who won dramatic concessions from all of its unions in order to keep the paper afloat.

(2) Scripps has allowed the Post to pay inflated rates for Scripps-owned services, such as UPI and NEA. The Antitrust Division in the course of the hearings found that from 1972 to 1977 Scripps overcharged the Post $1,680,000 for various goods and services.[40]

(3) The Post has not raised its circulation price to match that of the Enquirer:

The Post refused to increase the price of the paper from 15¢ to 20¢ after the Enquirer did so in November 1977, although the two papers historically since the 1930s have raised circulation prices to match each other within months of a change by one or the other. The Post contended that it would lose too much money and circulation if it increased its subscription cost. But even if the paper had suffered a projected decline of 10 percent in street sales and 4 percent in home delivery, it would have increased its revenues about $400,000 a year

if it had raised its price to 20¢ for street sales and 18.5¢ for home delivery. If both the street and home sales prices were set at 20¢, even with projected losses of 10 percent in street sales and 4 percent in home delivery, the company would have realized increased revenues of $1 million annually.

(4) The Post has not established any promotional packages to increase circulation. Rather, the paper cut its circulation promotion budget from $603,000 to $441,000 between 1976 and 1978 and failed to replace its promotion director when he resigned.

(5) In 1977 Belden Associates, a market research firm retained by the Post and other Scripps papers, recommended a study costing $9,000 to test whether there was a market for a Sunday edition. But rather than spend $9,000 to test the Sunday market, Scripps began the Valu-Saver, a total market coverage free-distribution advertiser. No other major metropolitan newspaper has ever attempted such a total market coverage free-distribution Sunday shopper. The venture was opposed by the Post's business manager and advertising director, and no market study was done to determine whether there was in fact a market for the Valu-Saver. It was published for 22 weeks at a cost of $616,000 and generated revenues of only $300,000.

(6) The Post brought no anti-trust action against the American Financial Corporation, the parent company of the Cincinnati Enquirer, when in 1975 it purchased the building in which the Post was housed. As a result of the sale of the property, the Post's rent was substantially increased. It is interesting to note that the Enquirer's parent company purchased the building housing the Post's operation while it continues to

rent space which is admittedly inadequate to house the Enquirer's operation.

(7) Scripps-Howard has a tradition of involving itself in joint arrangements. Of the current 20 joint operating agreements in the U.S., Scripps owns seven, or more than one third. In every case, Scripps affirmatively entered into these agreements. The next largest owner of newspapers in joint operating arrangements is Gannett, which owns three papers in joint operations. But unlike Scripps, Gannett purchased these papers already subject to joint operating arrangements.[41] These joint arrangements represent 47 percent of Scripps' total newspaper holdings and 4 percent of Gannett's.

Congress' intent in promulgating the Newspaper Preservation Act was to maintain competition in the newspaper industry through the traditional application of the antitrust laws with the narrow exception carved out by the Act. Viewed in that light, it is clear that Congress could not have intended that a newspaper which became a failing one through the deliberate efforts of management would be entitled to the benefits of the Newspaper Preservation Act. And by the same token, Congress could not have intended to permit a newspaper owner to operate his paper in a way in which its financial deterioration was inevitable simply because the newspaper's owner knew that he could enter a joint operating arrangement when and if his paper failed. Such an interpretation would tip the balance in favor of a newspaper taking the least imaginative and most conservative approach to its operations.[42]

Cincinnati is not the only city where the Newspaper Preservation Act is being evaluated at the present time. Preliminary discussions are now going on at the St. Louis Globe-Democrat and the Post-Dispatch to revise

their already-existing agreement to integrate their advertising, circulation and business office operations. These two papers are the only ones of the 20 joint arrangements where these functions have remained separate while the printing has been joint.[43]

II. THE ACT HAS NOT PREVENTED THE DEMISE OF DUAL EDITORIAL VOICES IN METROPOLITAN AREAS

Since passage of the Act in 1970 eight cities with two competing daily newspapers have lost one of the dailies. There remain only 35 cities in the country with competing newspapers without joint operating arrangements.

When the Act was passed in 1970, there were 22 joint arrangements in effect. Today, 20 remain. (Gone are competing dailies in Franklin-Oil City, Pa., and Bristol, Tenn.) Aside from the grandfather portion of the Act which permits the continuation of joint agreements where they existed prior to 1970, the NPA has done little if anything to preserve separate editorial voices.

The Antitrust Division noted that the record establishes that the causes of the decline in the number of cities with fully competing daily newspapers include "economies of scale, the growth of alternative media especially suburban daily newspapers, and the movement of population to the suburbs."[44]

By shielding newspapers from the forces at work in the economy, are we not creating false conditions under which to operate separate editorial voices, and is there justification in granting a monopoly advantage to two metropolitan newspapers in preference to independent suburban daily newspapers which also would function as additional

editorial voices?

The record shows that the Newspaper Preservation Act has saved no newspaper from failure.[45] It has merely enriched the profitability of two newspapers that no longer compete in any ordinary sense of the term.

One could speculate that if Scripps wins in Cincinnati it might next turn to its holdings in Denver and Cleveland (two of the remaining 35 cities with independently competing dailies) and decide that the Denver Rocky Mountain News and the Cleveland Press are in probable danger of financial failure and seek joint agreements with the Denver Post and the Cleveland Plain Dealer.

III. THE NEWSPAPER PRESERVATION ACT NOW ENCOMPASSES NEWSPAPERS WHICH ARE NOT FAILING

The U.S. Supreme Court in early 1977 let stand a lower court decision that the Newspaper Preservation Act does not forbid joint operating agreements between two newspapers that are both financially sound.

In 1974 The Newspaper Guild filed suit against then Attorney General Edward Levi for issuing a regulation on December 20, 1973, regarding the Act which stated:

> The Newspaper Preservation Act does not require that all joint newspaper operating arrangements obtain the prior written consent of the Attorney General. The Act and these regulations provide a method for newspapers to obtain the benefit of a limited exemption from the antitrust laws if they desire to do so. Joint newspaper operating arrangements that are put into effect without the prior written consent of the Attorney General remain fully subject to the antitrust laws. 28 C.F.R. para. 48.1 (1974), 39 Fed. Reg. 7 (Jan. 2, 1974)

The Guild sought an injunction against implementation of the regulation and a declaratory judgment that the regulation was an unlawful

interpretation of the Act.

The Newspaper Guild won its case in the U.S. District Court in Washington, but upon appeal to the U.S. Circuit Court of Appeals in Washington, the decision was reversed.[46,47] Hence, a reading of the statute now suggests that the Act does not forbid joint operating arrangements between two newspapers that are both financially sound, provided that they are not competing newspapers.

This "clarification" of the Act appears somewhat incongruous in light of the very purpose of the Act. The Justice Department in its presentation of the case in the District Court could not cite one instance where two newspapers would seek a joint operating venture but would not be competing. District Court Judge Flannery noted in his findings that:[48]

> Arrangements between newspapers in different cities--as hypothesized by the [Justice Department]--simply do not exist. And the Justice Department has not cited a single such arrangement . . . . Since the Court concludes that [joint operating] arrangements are and will be made by competing daily newspapers, it is consistent with the Act to require all such arrangements to obtain prior Attorney General consent.

But what the Appeals Court determined was that it was not unlawful for two newspapers to enter a joint operating arrangement without prior approval of the Attorney General. Only parties seeking an antitrust exemption for such an arrangement need obtain approval. This, in effect, opens the door for two newspapers to enter into such an arrangement and then place the burden on the Justice Department or some aggrieved party to file suit against them for having violated anti-trust laws.

This commentary has attempted to show that the Newspaper Preservation Act has (I) allowed unnatural monopolistic practices to exist where otherwise the free marketplace might operate, (II) failed to truly save failing newspapers, and (III) opened the way for non-failing newspapers to gain special antitrust exemption.

As public policy regarding antitrust legislation and enforcement is studied by this session of the Congress, it appears that a reassessment of the policy to preserve the Newspaper Preservation Act is in order.

FOOTNOTES

1. Pub.L. 91-353, July 24, 1970, 84 Stat. 466, 15 U.S.C. 1801-4. (Reprinted in Appendix A)

2. "Newspaper Preservation Act," 1970 U.S. Code Cong. & Adm. News at 3548.

3. Ibid.

4. 15 U.S.C. Secs. 1-7.

5. 15 U.S.C. Secs. 12-27.

6. 15 U.S.C. 18.

7. International Shoe Co. v. FTC, 280 U.S. 291, 74 L.Ed. 431, 50 S.Ct. 89 (1930).

8. Ibid.

9. 96 Cong. Rec. 16435, daily ed. Dec. 12, 1950.

10. "Clayton Act--Failing Company Defense," 11 ALR Fed. at 863-4.

11. 280 U.S. 291.

12. Ibid.

13. International Shoe Co. v. FTC, 280 U.S. 291 (1930); Granader v. Public Bank, 397 U.S. 1065 (1969); U.S. v. Maryland & Virginia Milk Producers Assn., 362 U.S. 458 (1958); Union Leader Corp. v. Newspapers of New England, 284 F2d 582.

14. 11 ALR Fed at 866.

15. Ibid at 867.

16. U.S. v. Citizen Publishing Co., 280 F.Supp. (D. Ariz.) 978 (1968).

17. Citizen Publishing Co. v. U.S., 394 U.S. at 133.

18. 280 F.Supp. at 982.

19. 394 U.S. at 134.

20. 280 F.Supp. 978.

21. 394 U.S. 131.

22. 280 U.S. 291.

23. Associated Press v. United States, 326 U.S. 1 (1945).

24. 394 U.S. at 139.

25. John Tebbel, "Failing Newspapers and Antitrust Laws," Saturday Review, Dec. 12, 1970, p. 58.

26. 1970 U.S. Code Cong. & Adm. News at 3550.

27. Ibid.

28. "Newspaper Lobby," The New Republic, July 18, 1970, p. 11.

29. 1970 U.S. Code Cong. & Adm. News at 3547.

30. U.S. v. Associated Press, 52 F.Supp. 362, 372 (S.D. N.Y.) (1943).

31. Bay Guardian Co. v. Chronicle Publishing Co., 344 F.Supp. 1155 (N.D. Calif.) (1972).

32. Editor & Publisher, May 31, 1975, p. 7.

33. SNPA Bulletin, Feb. 14, 1977, p. 3.

34. Editor & Publisher, Oct. 7, 1978, p. 7.

35. Editor & Publisher, July 1, 1978, p. 13; SNPA Bulletin, Feb. 28, 1977.

36. Antitrust Division's Post Hearing Brief, Proposed Findings of Fact and Conclusions of Law, and Objections to Scripps Proposed Findings of Fact and Conclusions of Law, in the Matter of: Application by the Cincinnati Enquirer, Inc., and the E.W. Scripps Co. for Approval of a Joint Operating Arrangement Pursuant to the Newspaper Preservation Act, 15 U.S.C. 1801 et. seq. Docket No. 44-03-24-4, filed 12/12/78.

37. Proposed Findings of Fact and Conclusions of Law of the International Typographical Union and The Newspaper Guild, in the Matter of: Application by the Cincinnati Enquirer, Inc., and the E.W. Scripps Co. for Approval of a Joint Operating Arrangement Pursuant to the Newspaper Preservation Act., 15 U.S.C. 1801 et. seq. Docket No. 44-03-24-4.

38. Cong. Rec. July 8, 1970, p. H. 6454.

39. ITU/TNG Findings of Fact.

40. Antitrust Division Findings of Fact, 25.

41. HR Rep. 91-1193, 91st Cong. 2d Session 5 (1970).

42. ITU/TNG Findings of Fact.

43. Guild Reporter, Feb. 23, 1979, p. 1.

44. Antitrust Division Findings of Fact, p. 26.

45. No evidence was ever presented at the original hearings on the Act to support the contention that one of the two newspapers in the 22 existing arrangements was failing at the time the agreements were put into effect. Hearings on S. 1520 at 240.

46. The Newspaper Guild v. William B. Saxbe, U.S. District Court for the District of Columbia, CVA No. 74-308, July 23, 1974.

47. The Newspaper Guild v. Edward H. Levi, Attorney General, U.S. Court of Appeals for the District of Columbia Circuit, No. 75-1014, Argued Dec. 9, 1975.

48. The Newspaper Guild v. William B. Saxbe, U.S. District Court for the District of Columbia, CVA No. 74-308, July 23, 1974.

APPENDIX A

THE NEWSPAPER PRESERVATION ACT*

SECTION 1: Title

This Act may be cited as the 'Newspaper Preservation Act.'

SECTION 2: Congressional declaration of policy

In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this chapter.

SECTION 3: Definitions

As used in this chapter--

(1) The term "antitrust law" means the Federal Trade Commission Act and each statute defined by section 44 of this title as "Antitrust Acts" and all amendments to such Act and such statutes and any other Acts in pari materia.

(2) The term "joint newspaper operating arrangement" means any contract, agreement, joint venture (whether or not incorporated), or other arrangement entered into by two or more newspaper owners for the publication of two or more newspaper publications, pursuant to which joint or common production facilities are established or operated and joint or unified action is taken or agreed to be taken with respect to any one or more of the following: printing; time, method, and field of publication; allocation of production facilities; distribution; advertising solicitation; circulation solicitation; business department; establishment of advertising rates; establishment of circulation rates and revenue distribution: Provided, That there is no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined.

(3) The term "newspaper owner" means any person who owns or controls directly, or indirectly through separate or subsidiary corporations, one or more newspaper publications.

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*Pub.L. 91-353, July 24, 1970, 84 Stat. 466, 15 U.S.C. 1801-4.

(4) The term "newspaper publication" means a publication produced on newsprint paper which is published in one or more issues weekly (including as one publication any daily newspaper and any Sunday newspaper published by the same owner in the same city, community, or metropolitan area), and in which a substantial portion of the content is devoted to the dissemination of news and editorial opinion.

(5) The term "failing newspaper" means a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure.

(6) The term "person" means any individual, and any partnership, corporation, association, or other legal entity existing under or authorized by the law of the United States, any State or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any foreign contry.

SECTION 4: Antitrust exemption

(a) It shall not be unlawful under any antitrust law for any person to perform, enforce, renew, or amend any joint newspaper operating arrangement entered into prior to July 24, 1970, if at the time at which such arrangement was first entered into, regardless of ownership or affiliations, not more than one of the newspaper publications involved in the performance of such arrangement was likely to remain or become a financially sound publication: Provided, That the terms of a renewal or amendment to a joint operating arrangement must be filed with the Department of Justice and that the amendment does not add a newspaper publication or newspaper publications to such arrangement.

(b) It shall be unlawful for any person to enter into, perform, or enforce a joint operating arrangement, not already in effect, except with the prior written consent of the Attorney General of the United States. Prior to granting such approval, the Attorney General shall determine that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper, and that approval of such arrangement would effectuate the policy and purpose of this chapter.

(c) Nothing contained in the chapter shall be construed to exempt from any antitrust law any predatory pricing, any predatory practice, or any other conduct in the otherwise lawful operations of a joint newspaper operating arrangement

which would be unlawful under any antitrust law if engaged in by a single entity. Except as provided in this chapter, no joint newspaper operating arrangement or any party thereto shall be exempt from any antitrust law.

SECTION 5: Reinstatement of joint operating arrangements previously adjudged unlawful under antitrust laws

(a) Notwithstanding any final judgment rendered in any action brought by the United States under which a joint operating arrangement has been held to be unlawful under any antitrust law, any party to such final judgment may reinstitute said joint newspaper operating arrangement to the extent permissible under Sec. 4(a) of this title.

(b) The provisions of Sec. 4 of this title shall apply to the determination of any civil or criminal action pending in any district court of the United States on July 24, 1970, in which it is alleged that any such joint operating agreement is unlawful under any antitrust law.

APPENDIX B

JOINT NEWSPAPER OPERATING ARRANGEMENTS

CITY	YEAR
Albuquerque, N.M.	1933
El Paso, Tex.	1936
Nashville, Tenn.	1937
Evansville, Ind.	1938
Tucson, Ariz.	1940
Tulsa, Okla.	1941
Madison, Wis.	1948
Birmingham, Ala.	1950
Fort Wayne, Ind.	1950
Lincoln, Nebr.	1950
Salt Lake City, Utah	1952
Shreveport, La.	1953
Knoxville, Tenn.	1957
St. Louis, Mo.	1957
Charleston, W.Va.	1958
Columbus, Ohio	1959
Pittsburgh, Pa.	1961
Honolulu, Hawaii	1962
San Francisco, Calif.	1964
Miami, Fla.	1966